No. 84-16 (6)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,
Appellants,

VS.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

A state regulation prescribing alternative types of rent for ground leases of state-owned property authorizes a form of rent calculated with reference to the volume of commodities moved across the leased land by the lessee. The regulation does not prescribe rates; these are left to case-by-case negotiation.

1. Does the Commerce Clause prohibit such a form of rent, regardless of the rental amount, if the lessee is engaged in interstate or foreign commerce?

2. If the lessee is engaged in foreign commerce, does such a form of rent constitute a tax on imports or exports, in violation of the Import-Export Clause?

3. If the lessee is engaged in interstate or foreign commerce, does such a form of rent constitute a duty of tonnage, in violation of the Tonnage Clause?

PARTIES BELOW

Appellants Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff constitute the current membership of the California State Lands Commission. Appellants McCarthy and Huff are the successors in office to two former members of the Commission who were named in the complaint. Appellees, in addition to the Western Oil and Gas Association, named in the caption, are Pacific Refining Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California, and Union Oil Company of California.

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A-1-A-13), as modified (J.S. App. A-14), is reported at 726 F.2d 1340. Neither the amended memorandum and order of the district court (J.S. App. A-17-A-25) nor the amended judgment of the district court (J.S. App. A-16) is reported.[1]

[1]The issues of state law raised in the complaint were fully disposed of by the state court of appeal, following an abstention order by the district court. The opinion of the state court of appeal is officially reported at 105 Cal.App.3d 554, and unofficially reported at 164 Cal.Rptr. 468. The judgment of the state superior court (trial court) (J.A. 140-141) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984 (J.S. App. A-1-A-13), and a timely petition for rehearing with suggestion for rehearing en banc was denied on April 6, 1984 (J.S. App. A-26). The notice of appeal was filed in the court of appeals on April 10, 1984 (J.S. App. A-27-A-28), and the appeal was docketed on July 5, 1984. Probable jurisdiction was noted on October 1, 1984. (J.A. 150.) The jurisdiction of this Court rests on 28 United States Code section 1254(2). (See *John P. King Mfg. Co. v. City Council of Augusta* (1928) 277 U.S. 100, 102-104; *McCollum v. Board of Education* (1948) 333 U.S. 203, 206.)

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

1. The Commerce Clause of the United States Constitution, which provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. . . . " (U.S. Const., art. I, § 8, cl. 3.)

2. The Import-Export Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports. . . . " (U.S. Const., art. I, § 10, cl. 2.)

3. The Tonnage Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any duty of tonnage. . . . " (U.S. Const., art. I, § 10, cl. 3.)

4. Section 2003 of title 2 of the California Administrative Code, which sets forth the alternative types of rent

that may be used for ground leases issued by the California State Lands Commission, and which provides:

"2003. Rental.

"(a) Rental for the various categories of use shall be generally as follows:

"(1) Commercial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) A percentage of annual gross income (the percentage being based on an analysis of the market for like uses and other relevant factors);

"(B) 9% of the appraised value of the leased land;

"(C) The volume of commodities passing over the lease premises.

"(2) Industrial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) 9% of the appraised value of the leased land together with 2¢ per diameter inch per lineal foot of pipelines and conduits on the leased premises;

"(B) The volume of commodities passing over the lease premises.

"(3) Right-of-Way Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $100:

"(A) 9% of the appraised value of the leased lands, together with compensation for any damage caused to such lands;

"(B) 2¢ per diameter inch per lineal foot;

"(C) The volume of commodities passing over the lease premises.

". . . . . ."

(Cal.Admin.Code, tit. 2, § 2003.)[2]

STATEMENT

This case arises upon a complaint for injunctive and declaratory relief seeking the invalidation of a provision of the leasing regulations of the California State Lands Commission (Commission). (J.A. 6-16.) The challenged provision authorizes the negotiation of rent for ground leases of state-owned real property based upon the volume of commodities put across the leased land by the lessee. (See J.S. App. A-29-A-37.)

1. The Leasing Program of the Commission

The Commission administers various categories of land owned by the State of California. (See Cal. Pub. Resources Code, §§ 6216, 6301.) Some of this land is upland property and is held under special grants from the federal government (e.g., school lands and swamp and overflowed lands); other land is so-called "sovereign land," which was obtained by the State by virtue of its admission to the Union[3] and consists of lands beneath tidal waters as well as the

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[2]The full text of section 2003 and of related sections of the regulations of the State Lands Commission is set forth in Appendix G to the jurisdictional statement (J.S. App. A-29-A-37). Section 2003, with immaterial revisions, is the current version of former sections 2006 and 2007, which are the sections containing the challenged provisions as originally enacted. The full text of former sections 2006 and 2007 is set forth in Appendix H to the jurisdictional statement (J.S. App. A-38-A-42).

[3]See *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370, 372-373; *Shively v. Bowlby* (1894) 152 U.S. 1, 11, 14-15, 26, 57-58. The court of appeals erroneously attributed the State's title to the Submerged Lands Act (43 U.S.C. §§ 1301-1343). (J.S. App. A-2.) That act merely *confirmed* the State's sovereign title, and functioned as a *grant* only as to lands on the open coast, lying between the low-water mark and the three-mile limit, which lands this Court had previously held were subject to "paramount federal rights." (See *United States v. California* (1947) 332 U.S. 19, 38-39.)

beds of inland navigable lakes and rivers. (J.A. 108.) The Commission is empowered to issue ground leases regarding such property (Cal. Pub. Resources Code, §§ 6501-6509) upon "such terms and conditions as the commission deems to be for the best interests of the state" (*id.*, § 6501.2).

Pursuant to statutory authorization (*id.*, § 6108), the Commission has enacted regulations governing its leasing practices. (See J.S. App. A-29-A-37.) The regulations categorize ground leases by type (e.g., commercial, industrial, right-of-way) and authorize various modes of rent, including various forms of fixed annual rents and also variable rents, such as rents based on a percentage of gross income and (most recently) rents calculated by reference to the volume of commodities passing over the leased land (volumetric rent). (*Ibid.*; J.A. 108-110.)

The industrial lease classification includes ground leases for marine terminal sites. (J.A. 108.) All of the state leases referred to in the declarations filed with the district court in support of plaintiffs' renewed motion for summary judgment (J.A. 17) are marine terminal leases. (See, e.g., J.A. 35-51.) These leases cover sizeable areas of land, and confer exclusive berthing privileges as well as the right to place piers, wharves, and other substantial structures upon state land.[4] For payment of rental, the lessee is allowed to appropriate to its own exclusive use for a term of years discrete parcels of state-owned property. (J.A. 108-109.)

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[4]E.g., J.A. 35-40 (Union Oil Company lease); J.A. 59 (Standard Oil Company lease). Standard's Long Wharf marine terminal at Richmond is substantial enough to be shown on a large scale map of port facilities in the Bay Area. (See Donley, Atlas of California (1979) p. 103.)

The lower courts erroneously characterized the particular leases cited in plaintiffs' declarations as dealing with pipeline rights-of-way. (J.S. App. A-2, A-17-A-18.) Although volumetric rents apply to commercial and right-of-way leases as well, the leases before the court were all industrial leases for wharves and ship-berthing facilities. (See J.A. 19-106.)

The leases usually provide for two or three renewal periods, "upon such reasonable terms and conditions as the State . . . might impose" (e.g., J.A. 40), after which the lease expires. The original lease terms and the terms on renewal are negotiable. (J.A. 111-115.)

The Commission is not the sole owner of such marine terminal sites. As set forth in the appendix to this brief, over 60 cities, counties, and harbor districts hold state legislative grants of tide and submerged land, including, for instance, the Ports of Richmond, San Francisco, Oakland, Los Angeles, and Long Beach.[5] There are 418 miles of tidal shoreline and 305,381 acres (over 477 square miles) of tide and submerged lands owned and controlled by local entities. (Cal. State Lands Com., Granted Lands Summary (1977).) The City of Los Angeles, for instance, controls 26 miles of shoreline under such a grant, comprising 13,304 acres. (*Ibid.*)

Also, many thousands of acres of tide and submerged lands are in private ownership and are leasable for such purposes. Private tideland patents issued statewide by the state Surveyor-General total some 80,000 acres. (See Taylor, Patented Tidelands: A Naked Fee? (1972) 47 State Bar J. 420, 421.) In San Francisco Bay, over 14,000 acres of privately-owned tide and submerged land remain available for such uses. (See *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 526 [162 Cal.Rptr. 327, 606 P.2d 362].)

2. The Volumetric Rental Provision

In March 1975, the staff of the Commission recommended amending the Commission's leasing regulations to include an additional form of variable rent. (Administrative Rec-

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[5]The Appendix, *infra*, depicts the location of such grants in relation to existing Commission leases for marine terminal sites, and gives the statutory references for each such legislative grant.

ord (A.R.) 1-47.)[6] The proposal, which included a schedule of specific volumetric rates for various types of commodities, engendered considerable opposition from potential and existing Commission lessees. (E.g., J.A. 116-125, 151-158.) Following hearings and receipt of written comments, the Commission referred the matter to its staff for further review. (J.A. 116.) In April 1976, following further meetings with those affected and an extended inquiry into forms of ground lease rental being used in the rental market, the staff altered its proposal on volumetric rent in several particulars, responding to many of the criticisms made of the regulations as initially proposed. (J.A. 116-125, 279-281.) The principal change was to provide for case-by-case negotiation of volumetric rents; specific rates were deleted. (J.A. 117-118, 120-122.) The Commission adopted the revised proposal at its April 1976 meeting.

The volumetric rental alternative, in common with the various other rental formats in use by the Commission, is applicable alike to all varieties of land administered by the Commission, not just tide and submerged land, and it is applicable alike to all lessees, regardless of whether they are engaged in intrastate, interstate, or foreign commerce. (J.A. 110; J.S. App. A-29-A-37.) Volumetric rent is not applicable solely to leases involving petroleum or petroleum products; such rent is applicable to "commodities" generally. (*Ibid.*) In practice, volumetric leases have been executed involving such diverse commodities as coke (J.A. 93-95) and sand and gravel (J.A. 110).

The manner in which a volumetric rental provision works and the manner in which the various components of a volumetric rental formula are negotiated are set forth in detail

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[6]The administrative record was compiled before the Commission in connection with the adoption of the challenged regulations, and was lodged with the district court as an exhibit on January 5, 1981. (J.A. 1, 3.)

in one of the Commission's affidavits below. (See J.A. 111-115.) In summary, a minimum rent is derived by applying a yearly rate of return against a negotiated figure for the land's fee value, and that minimum rent is then applied against the rent accruing under the variable rent provision. (J.A. 111-112.) Also negotiable are the volumetric rate or rates and the volume levels at which different rates will apply. (J.A. 114; compare J.A. 25-34 (proposal) with J.A. 42-45 (negotiated terms).)

3. Volumetric Leases Generally

The results of the Commission staff's inquiry into volumetric ground leases, which led to the adoption of the revised regulation, are summarized in the staff report submitted to the Commission at its April 1976 meeting. (J.A. 116-125; see also J.A. 279-281.) In addition, substantial excerpts from the administrative record have been included in the joint appendix.

The principal criticism of volumetric rent at the hearings was that such a rent is used only in circumstances where the lessor provides services, facilities, and improvements for the use of the lessee. In response to this criticism, it was established that, where such improvements were provided, a part of the volumetric charge represented a variable return on the raw land. (J.A. 124-125.)

Numerous examples of volumetric rental charges for unimproved land were also developed, including gallonage rentals paid by service station lessees to the oil companies (J.A. 194, 348-349); rentals based on gallonage and a percentage of gross receipts for leases of marina sites where improvements are made and maintained by the lessee (J.A. 304-319, 334-337, 360-362); rentals for rights-of-way for the transportation of logs and coal based on the number of board-feet of logs or tons of coal passing over the road (J.A. 118-119); and franchise fees for the laying of pipe-

lines in city streets based upon a percentage of the per-barrel royalty generated by production of oil on a nearby production lease (J.A. 380-384).

Closest in point were the volumetric charges made by various ports for leases under which the lessee both constructed and maintained the improvements. (E.g., J.A. 245-246 (Pacific Gas & Electric Company pays to the Port of San Francisco 35 cents per ton of fuel oil put across wharf; PG&E built and maintains wharf and pipelines); J.A. 183-184 (Union Oil Company pays per barrel rental to Port San Luis for unimproved submerged lands; wharf built by Union); J.A. 368-379 (unimproved site used for oil and gas production, treating, storage and transportation center, together with pipeline easements running to and from site; rental paid by Texaco to private landowner based on percentage of per-barrel royalty paid by Texaco on offshore production lease); J.A. 289-303 (for privilege of laying pipelines on port property, Exxon pays Long Beach rent based on the barrels of oil put through pipelines constructed and maintained by Exxon).)

Concerning the volumetric "wharfage" charges made by ports for the use of their property (stated in cents per ton, cents per barrel, et cetera),[7] it was established that the ports figure the value of the raw land beneath wharves into their rate base for purposes of calculating a fair return in the form of wharfage and other port tariff charges (J.A. 408-409, 423-428, 445), and that such volumetric revenues exceed what is necessary to obtain a return on improvements alone (J.A. 124-125).

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[7]The Port of Long Beach tariff is set forth at pages 283 through 288 of the joint appendix. It is representative of the other tariffs included in the administrative record, and includes definitions of the various port charges and the land, improvements, services, or facilities to which they are applicable.

4. Proceedings Below

Shortly after adoption of the amendment, the plaintiff oil companies and their trade association, the Western Oil and Gas Association, filed suit in the district court, seeking a declaration that the regulation authorizing the negotiation of volumetric rent was invalid, and an injunction prohibiting the members of the Commission from demanding and collecting such rent. (J.A. 6, 15.) The complaint alleged that any such rental charges were *per se* invalid under the United States Constitution as "(a) an unlawful charge, duty or impost on imports; (b) an undue burden and unlawful charge upon interstate commerce; and (c) an unlawful duty on tonnage." (J.A. 10.)

The complaint also presented issues of state law, alleging that the regulation was contrary to a state leasing statute, and that the regulation was "unreasonable, arbitrary and capricious." (J.A. 14-15.) Following an abstention order by the district court, these state law issues were finally determined adversely to the plaintiff companies. The state courts concluded that in authorizing a volumetric mode of rent, the Commission had acted reasonably in light of the record before it. (J.A. 140-141; *Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 562, 564-565 [164 Cal.Rptr. 468], hg. denied by Cal. Supreme Ct. July 2, 1980.)

Upon return of the case to the district court, the parties filed cross-motions for summary judgment on the remaining federal constitutional issues. The question presented was the *per se* validity under the Constitution of the type of volumetric rent authorized by the Commission's regulation, regardless of amount.[8] The district court gave judg-

[8]At oral argument on the motions, plaintiff's counsel framed the issue as follows: "To us what this case is about is just the validity of a throughput charge *per se*, whether the State can charge even one-millionth of [a mill] as a throughput fee." (Reporter's Transcript, p. 12.) Neither in their pleadings nor in their moving papers did plaintiffs ask that particular volumetric rents that had been

ment for the plaintiffs. It rejected as inapposite the State's argument that volumetric rent was a commonly-used and reasonable form of rent and thus permissible under the Commerce Clause. (J.S. App. A-22.) The Court also denied any applicability of this Court's cases concerning exemption of the States from the Commerce Clause when they act as "market participants", concluding that "there is no analogous competitive marketplace involved in this case." (J.S. App. A-23.) Finally, it rejected the State's contention that neither the Import-Export Clause nor the Tonnage Clause was applicable to ground rents. (J.S. App. A-23-A-24.) The Court determined that a volumetric land rental, without the provision of additional services and facilities by the State, constituted the type of "trade barrier" that the Commerce, Import-Export, and Tonnage Clauses were "collectively" intended to prevent, and that such a rental "places a burden on interstate and foreign commerce that cannot be justified under the facts of this case." (J.S. App. A-24.)

The district court entered judgment enjoining the Commission "from assessing and collecting rent based upon the volume of commodities in interstate and foreign commerce passing over tidal and submerged lands in reliance upon California Administrative Code §§ 2005(b)(2) and 2005(b)(3)."[9] (J.S. App. A-24.)

On appeal, the court of appeals affirmed, concluding that the regulation authorizing the negotiation of volumetric rent was barred by the Commerce Clause and the Import-Export Clause. (J.S. App. A-13.) In reaching its conclusion under both constitutional provisions, the court relied on the decisions of this Court invalidating certain types of taxes. The court did not reach plaintiffs' Tonnage Clause contention.

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negotiated for specific leases be declared invalid, although there were references to alleged high rates of return on some leases.

[9]Currently Cal.Admin.Code, tit. 2, §§ 2003(a)(2) and 2003(a)(3). (See J.S. App. A-33-A-34.)

On the Commerce Clause issue, the court rejected the State's argument that the regulation authorized a reasonable form of rent, given the common use of this form of rent in the rental market generally. Instead, it concluded that the case was governed by Supreme Court cases concerning "user taxes", citing cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707. (J.S. App. A-8-A-9.) In so doing, it rejected the application of this Court's cases distinguishing taxes from rent charged for the private appropriation of particular parcels of public property. Applying the "user tax" cases, it concluded that volumetric rent for unimproved land necessarily yielded rentals "disproportionate to the benefits conferred by the State," that such rents were "not directed toward compensating the State for the use of the land" or the "wear and tear" from the use of the land, and that there was "no sufficient relation between the measure employed and the extent of the use of the state property." (J.S. App. A-8-A-9.) The court also rejected the State's additional contention that, as but one "market participant" in the negotiation of ground leases, both for upland property and tide and submerged lands, the Commission was not subject to the strictures of the Commerce Clause.

On the Import-Export Clause issue, the court adopted a similar rationale. Having determined that "there is no correlation between the volumetric rates and benefits conferred by the State," it concluded that the State "is 'levying . . . on citizens of other States by taxing goods merely flowing through their ports to the other states not situated as favorably geographically.'" (J.S. App. A-12-A-13.)[10]

[10]The court of appeals did not reach plaintiffs' assertion that volumetric rent is barred as well by the Tonnage Clause. Because the district court reached this additional contention, and decided it adversely to the Commission, the Tonnage Clause question is included among those presented by this case, in order that this Court may render a fully-dispositive decision.

SUMMARY OF ARGUMENT

The issue here is whether the United States Constitution completely forecloses use by the States and by local agencies (see *Guy v. Baltimore* (1879) 100 U.S. 434) of a form of ground lease rental that is commonly used in the rental market. The plaintiff oil companies claim that the question is indeed one of constitutional dimension and that the Constitution prohibits such a form of rent, at least when the State or a local agency is dealing with a lessee engaged in interstate or foreign commerce. They do not dispute, and in effect concede, that state and local governments may reasonably employ the challenged rental mode when dealing with persons engaged only in intrastate commerce. And they admit that private lessors are free to use such a form of rent regardless of the nature of the business conducted by their lessees.

1. A threshold question is whether the States, when negotiating ground leases for their property, are subject to greater strictures than are other lessors. Must the States offer independent justification for the rental modes that they choose to employ when entering the rental market?

a. This Court has recognized that States, when they act only as market participants, should be subject to no greater restraints than are private participants in the market. They should be free to choose with whom they will deal, and upon what terms. The doctrine applies here. The State Lands Commission is but one of many public and private land owners who control sites suitable for the loading and offloading of petroleum and petroleum products. Further, the application of the doctrine is uncomplicated here by the presence of any ulterior governmental goals. The State Lands Commission is participating in the market purely and simply to seek and obtain a fair rental for its land. Solely to obtain the advantage of a rental mode in common use by other lessors, it has amended its leasing regulations to allow the negotiation of volumetric rent.

Neither are there present here any of the side effects of the market participant doctrine that have caused concern in the course of its past applications. There is no discrimination against those engaged in interstate or foreign commerce; there is no effort to dictate or control the contractual relationships of other parties; and there is no evidence that such commerce has been or will be impeded in any way by use of this rental mode.

b. The rejection of the market participant doctrine by the court of appeals in this case rested solely on an indefensibly narrow definition of the "market" in which the State is participating. Ignoring the entirely consensual nature of the initial decision to enter into a ground lease, the court concluded that the State enjoyed a "monopoly" on a particular parcel of leased land when it came time to negotiate a revised rent upon renewal; that there accordingly were no other participants in the "market"; and that the doctrine therefore did not apply.

The time at which to define the market is prior to entry into the contract. After that point, there may be greater or lesser restraints on the freedom of both parties, depending on the terms of the contract, but that is as a result of the contract and actions taken in reliance on its terms, not the scope of the market. The Commission's leases do allow the substitution of new terms upon renewal, but only if they are reasonable. The doctrine was erroneously rejected by the court of appeals.

2. Even if the market participant doctrine does not apply, there is ample justification for the "reasonableness" of the rental form incorporated into the Commission's regulations.

a. In adopting the challenged regulation, the Commission looked to leasing practices in the ground lease market generally. The Commission was not an innovator in authorizing this form of rent. It has been widely used by other public and private lessors for both improved and unim-

proved property and regardless of the character of the commerce in which the lessees were engaged. The plaintiff oil companies are familiar with it, since they charge rent of their service station lessees on a gallonage basis. Several of them also pay volumetric rental to California ports for unimproved port land upon which they, not the ports, construct required improvements.

b. The court of appeals did not dispute the existence of these leasing practices. The court instead concluded, under the supposed compulsion of this Court's "user tax" cases, that the States were held to a different standard than were private lessors in choosing among available rental modes, and could only use rental modes that were aimed at defraying the State's out-of-pocket costs.

There is of course no form of ground rent—fixed or variable—that is limited to cost recovery alone. Further, there is no special constitutional legitimacy attached to fixed annual rents which derive from the land's fee value. Variable rents, including both percentage rents and volumetric rents, are keyed instead to the intensity of use of the leased land by the lessee, not the appraised fee value of the property.

3. This Court's tax cases, involving alleged duties on imports, alleged duties of tonnage, or alleged unreasonable burdens on interstate commerce, do not apply here and only serve to confuse matters, as is evident from the decision of the court of appeals. The type of charge authorized here is clearly rent, not a tax. If a reasonableness standard is to be applied to rental modes selected by state and local governments, specialized cases from the tax field do not provide it. Rather, reference should be had to commonly-accepted practice in the rental market for ground leases. Such practice clearly supports the reasonableness of the rental mode authorized by the Commission's regulation.

ARGUMENT

Reduced to its simplest terms, the argument of the oil companies is that the United States Constitution tells state lessors, alone among landlords, that they may use but one of the various ground lease rental formats in common use by other lessors when dealing with persons engaged in interstate or foreign commerce. The companies argue that only a flat annual rent, based on a percentage of fee value, is permissible. Volumetric rent (and presumably any variable rent, including percentage rent) is, *per se,* proscribed by the Constitution because it allegedly bears no relation to the value of what is leased. It is therefore not really rent, but rather a "tax" which is proscribed by the Commerce, Import-Export, and Tonnage Clauses. So the argument runs.

The court of appeals went even further. Its apparent conclusion, given its heavy reliance on "user tax" cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707, is that the States are limited to cost-recoupment in negotiating ground rents. The court referred to the "compensating" nature of such a charge, and stated that the "charge on [a] state-provided facility must be designed to defray its cost." (J.S. App. A-9.) If supportable, this would truly put the States in a class by themselves. There is no type of ground lease rental whereby the lessor limits his rent solely to what is necessary to recoup his out-of-pocket costs in connection with the lease.

Both the oil companies and the court of appeals ignore modern-day ground lease practice, in which the fee value of the leased land or the lessor's costs are not the sole reference points for an appropriate rent. As the use of variable rent demonstrates, intensity of use of the leasehold is also an appropriate yardstick for determining rent. The gallonage rent which these plaintiffs charge their own retailers (J.A. 194, 348-349) is a conspicuous example of a rent tied to intensity of use of the leased land.

It is therefore tempting to move immediately to a defense of the reasonableness of the volumetric rental mode, arguing that, because it is in common use by lessors and lessees generally, it therefore passes muster under the Commerce Clause. Indeed, the Commission has so defended its regulation throughout this litigation. There is a threshold question that should first be answered, however.

When negotiating the rental for a ground lease or when entering into any other type of contractual relationship, why should a State, any more than any other person, be required to independently justify the reasonableness of contractual terms consensually arrived at?

Accordingly, we first discuss the cases of this Court that relieve the States from any requirement of such an independent justification where the State acts as a market participant.

I. WHERE THE STATE IS BUT ONE PARTICIPANT AMONG MANY LESSORS, PUBLIC AND PRIVATE, IN THE MARKET FOR GROUND LEASES, NO ISSUE UNDER THE COMMERCE CLAUSE IS PRESENTED

A. The Rental Modes that a State Chooses to Use for Its Ground Leases Need Not Be Justified Under the Commerce Clause Where the State Is Acting As a Market Participant

The "market participant" exemption from application of Commerce Clause scrutiny to state action is articulated in the following cases: *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429; *White v. Massachusetts Council of Constr. Employers* (1983) 460 U.S. 204; and *South-Central Timber Development, Inc. v. Wunnicke* (1984) ..... U.S. ....., 104 S.Ct. 2237. The cases hold that if a State is not regulating a market, but rather is participating in it, then as a matter of "even-handedness" the State is subject to no greater restraints than are other market participants; it is similarly free to determine with whom it will contract, and on what terms.

(*White, supra,* 460 U.S. at pp. 208, 210; *Reeves, supra,* 447 U.S. at pp. 436-439, and fn. 12.)

The market participation by the State in this case fits comfortably within the confines of the doctrine. This is particularly so because there are not here present any ulterior "governmental" goals motivating the State's participation; it is merely seeking to obtain the fair rental rental value of its property, nothing more. This is therefore a "purer" market participation case than any of those that have preceded it. The market participation in *Hughes* was a means of achieving an environmental goal; that in *Reeves* a means of preserving for consumption by South Dakota citizens the cement produced by the State's cement plant; and that in *White* a means of enhancing the employment opportunities of Boston residents. Again in *South-Central,* where the Court found the doctrine inapplicable, Alaska's challenged contractual provision was motivated by the typically governmental motive of encouraging the domestic timber-processing industry. Particularly when such measures can be characterized as "protectionist" in nature, and clearly could not have been achieved through state taxation or regulation,[11] substantial tensions are created between the purposes of the Commerce Clause on the one hand and the desire on the other to allow the States the same freedom to contract enjoyed by private persons. No such background motive complicates application of the market participant doctrine in this case.

Neither are there present here any of the other factors that have caused concern in past applications of the doctrine. There is no discrimination against interstate or foreign commerce; the regulation applies as well to intrastate lessees. Mere passage by goods across the State's borders does not trigger any volumetric rent; only passage over

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[11]See dissenting opinion by Justice Powell in *Reeves, supra,* 447 U.S. at pp. 447-449.

discrete state ground leases does so. (See *Hughes, supra,* 426 U.S. at p. 803 ("state lines" cannot constitute trade barriers).) Neither is there any state effort to reach beyond the parties to the lease contract and regulate the contractual relationships of others who are not in privity.[12] And finally, there is absolutely no evidence in the record—and the companies made no effort to produce any—that use of volumetric ground lease rent by the Commission will reduce or impede by one iota the flow of goods in interstate or foreign commerce. Some such restricting impact—in some cases involving total prevention of the flow of goods or services—was present in each of the four cases in which the doctrine has been discussed, and was the object of concern, even though such interference is permitted where the doctrine is otherwise applicable.[13]

In summary, the regulation challenged here is aimed only at permitting the Commission to obtain, through negotiation, a type of rental that others are using. It is participating in the market, and subject to market forces. To deny the Commission use of this rental mode would, in some cases, require it to subsidize certain of its lessees. But "the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business."[14] Because the State is not compelled to lease its property in the first instance, lease terms can and should be left to negotiations between the parties. The alternative is to constitute the federal courts as rent review boards charged with making a series of ad hoc determinations of "reasonableness" con-

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[12]See dissenting opinion by Justice Blackmun in *White, supra,* 460 U.S. at pp. 216-223.

[13]See *Hughes, supra,* 426 U.S. at pp. 806 and fn. 15, 809 and fn. 18, 810; *Reeves, supra,* 447 U.S. at pp. 447-452 (Powell, J., dissenting); *White, supra,* 460 U.S. at pp. 223-224, fn. 7 (Blackmun, J., dissenting); *South-Central Timber, supra,* 104 S.Ct. at p. 2247.

[14]*Hughes, supra,* at pp. 815-816 (Stevens, J., concurring).

cerning this or that rental mode or rental amount. From the perspective of both the federal courts and the States, such a result is to be avoided. (See *Reeves, supra,* 447 U.S. at p. 438, fn. 10 (quoting with approval *American Yearbook Co. v. Askew* (M.D. Fla. 1972) 339 F.Supp. 719, 725).)

B. The Court of Appeals Mistakenly Rejected Application of the Market Participant Doctrine Based on Its Erroneous Conclusion that the State Enjoyed a "Monopoly"

The State has no monopoly on sites for the offloading or onloading of petroleum and petroleum products. That is evident from the numerous alternative sites owned both by private parties (see *ante,* p. 6) and by other public agencies (see map and listing of tide and submerged land grantees contained in the Appendix, *infra*). And it is clear that many of these competing sites are now handling substantial volumes of such commodities, particularly Long Beach and Los Angeles. (See Donley, Atlas of California (1979) p. 102.)

The court of appeals responded to this reality with a highly contrived and constricted definition of the relevant "market" in which the Commission was participating. Adverting to but one of the contexts in which volumetric rents may be negotiated (that of renewal of an existing lease), the court concluded that the State enjoyed a "monopoly" that rendered the market participant doctrine inapposite:

> "Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs' facilities does not permit them to 'shop around'. There is no other competitor to which they can go for the rental of the required strip of California coastline. The Commission has a complete monopoly over the sites used by the oil companies. The companies have no choice but to renew their leases despite the volumetric rate, as the

> oil, gas and petroleum-derived products cannot be transported to plaintiffs facilities without traversing the state-owned lands. This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce. We therefore reject the State's contention that its leasing activities are not subject to Commerce Clause scrutiny." (J.S. App. A-6.)

One might just as readily say that the lessor-owner of the downtown block upon which an office building sits enjoys a "monopoly" of office sites in the area when it comes time to consider renewal of an existing lease or the reissuance of an expired one. The lower court's error can best be understood by studying the various points in time at which a rental (volumetric or otherwise) may be negotiated.

First, there is the point at which no lease for a marine terminal exists. In this instance, the refinery, if one exists, is certainly not dependent on an adjacent marine terminal as the means of receiving and dispatching petroleum and petroleum products, for it never would have been built on the mere "hope" of the company later being able to strike a bargain with the owner of the terminal site. Such a preexisting refinery would most likely be serviced by an upland pipeline originating at either an inland location or a marine terminal located at a distance.[15] If, as is more likely, no refinery is in existence, and direct supply by oceangoing tanker is the preferable economic alternative, a refinery will be built only if a satisfactory lease can be negotiated with the owner of the adjacent tide and submerged land.

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[15]There are numerous such upland pipelines in California, which bring oil to refineries either from inland locations or from terminals up or downcoast from the refinery. (See Donley, Atlas of California (1979) p. 87.)

A satisfactory lease would provide for a term of years sufficient to amortize not only the cost of the wharf to be built on the leased site, *but also the cost of the adjacent refinery*, for there is always the possibility, upon the termination of the lease, that the lessor will not wish to reissue the lease or that the parties will be unable to come to terms. There certainly would be no obligation on the part of a private lessor to agree to reissuance of such a lease subsequent to its expiration, and a public lessor should enjoy like discretion.[16]

If the prospective lessee cannot negotiate a primary term of sufficient length to amortize his investment in both the refinery and wharf, he can seek to negotiate a renewal provision that, added to the primary term, will provide an adequate amortization period. If the prospective lessee cannot obtain such terms, he is free to walk away. But if he can obtain a renewal provision sufficiently protective of his long-term investment, he will enter the lease.

The Commission's leases routinely include such a provision. Two or more renewal terms, usually 10 years each in duration, are customarily provided for. (E.g., J.A. 40.) Although upon renewal the Commission may request alter-

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[16]A contrary conclusion—that the State as lessor is compelled in such circumstances to reissue the lease in perpetuity—would run afoul of California statutory and constitutional provisions, because it would constitute a de facto alienation of tide and submerged lands. Since 1909, the State has been prohibited by statute from selling tide and submerged lands. (Cal. Pub. Resources Code, § 7991 (Cal. Stats. 1909, ch. 444, § 1, p. 774).) Sales of tideland within two miles of an incorporated town or city are also prohibited by the California Constitution. (Cal.Const., art. X, § 3.) Further, the common law tidelands trust prohibits such alienation except in narrowly defined circumstances. (*City of Berkeley v. Superior Court* (1980), 26 Cal.3d 515, 521-525 [162 Cal. Rptr. 327, 606 P.2d 362].)

ation of the terms and conditions of the lease, including rent, it is confined to "reasonable" changes. (*Ibid.*) Such renewal terms are not unilaterally imposed, but rather are negotiated, just as are the initial lease terms. (J.A. 111-115.) If agreement on terms proves elusive, and the lessee feels that the Commission's terms are "unreasonable", he has his remedy in the form of an action for breach of contract.

To sum up, the only appropriate time to assess whether a monopoly exists is at that point when neither party is contractually bound to the other. At *that* point, are both parties free to contract or not as they choose or is one party constrained by circumstances to deal only with the other? Once the bargain is struck, the freedom of action of both parties is severely circumscribed, not by virtue of any monopoly that one has versus the other, but because they have mutually bound themselves to honor a contract and have acted in reliance on that contract.

Indeed, the argument of the court of appeals proves too much; for if the Commission has a "monopoly" upon lease renewal that triggers Commerce Clause scrutiny of the "reasonableness" of the proposed new rental, then *any* such lease renewal is subject to such scrutiny, including renewals where the Commission desires to change the rent, not to a volumetric mode, but to an increased dollar amount of fixed annual rent. We again have the specter of the federal courts functioning as arbitrators of every conceivable dispute over lease renewal terms where one party is a public agency and the other is engaged in interstate or foreign commerce.

The court of appeals concluded that the market participant exception did not apply only because it applied a strained definition of "monopoly" that was premised upon an unjustifiable characterization of the relevant market.

II. VOLUMETRIC RENT IS CONSTITUTIONALLY PERMISSIBLE

The court of appeals necessarily conceded that the State has a "right to the reasonable rental value of its property." (J.S. App. A-6, A-8.) It is established that interstate or foreign commerce is not entitled to a subsidy by the States; it "must pay its own way." (See *Ott v. Mississippi Barge Line* (1949) 336 U.S. 169, 174; *Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 254.) A venerable line of precedent makes clear that a State may obtain compensation for services rendered or property provided, even though the cost of conducting interstate or foreign commerce is thereby increased. (E.g., *Cooley v. Board of Wardens* (1851) 53 U.S. (12 How.) 299, 315-320 (pilotage); *Atlantic & Pacific Tel. Co. v. Philadelphia* (1903) 190 U.S. 160, 162-163 (cost of supervising telegraph company's local operations); *Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 701-702 (wharfage); *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 97-98 (rent for space occupied by telegraph poles).) In the words of this Court:

> "Reasonable charges for the use of *property, either on water or land,* are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. [Citations omitted.] That freedom implies exception from charges other than such as are imposed by way of compensation for the use of the *property employed,* or for facilities afforded for its use. . . . " (Emphasis added.) (*Gloucester Ferry Co. v. Pennsylvania* (1885) 114 U.S. 196, 217.)

The cases which suggest such a "reasonableness" limitation on charges made by a State for the use of its property do not quite fit the situation at hand. They involve situations where the charges were unilaterally imposed by government, rather than consensually arrived at, and pertained either to facilities that were in the nature of public utili-

ties or "affected with the public interest,"[17] or that involved public property that the private party had a right to use under a federal statute.[18] Neither situation obtains here. The Commission is here functioning simply as a landowner, and is not affirmatively providing services to the public generally. Nor is there any federal statute that entitles any group of prospective lessees to use state property, thereby implying some judicial monitoring of the compensation sought by the State.

The Commission is nonetheless willing to justify the reasonableness of a volumetric rental mode for ground leases, if for some reason the market participant exception to the Commerce Clause is determined to be inapplicable.[19]

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[17]See, e.g., *Transportation Co. v. Parkersburg, supra,* 107 U.S. at pp. 699-704, 706-707; *Ouachita Packet Co. v. Aiken* (1877) 121 U.S. 444, 447-450. In discussing reasonableness, these cases are discussing principles of the common law concerning restrictions on the charges of wharfingers (see, e.g., *Dutton v. Strong* (1861) 66 U.S. (1 Black) 23, 32-33), not a requirement imposed by the Constitution.

[18]There are numerous cases involving the "reasonableness" of charges unilaterally imposed by cities for the use of their streets for telegraph poles. (E.g., *St. Louis v. Western Union Telegraph Co., supra; Essex v. New England Tel. Co.* (1916) 239 U.S. 313.) It is apparent, however, that the "reasonableness" requirement regarding such charges stems from the companies' federal statutory entitlement to use of the streets. (See *Essex, supra,* 239 U.S. at p. 320.) Otherwise, a city could nullify the statutory guarantee of use by imposing exorbitant charges. Where such charges have been arrived at consensually, rather than unilaterally imposed by the city, the indication is that the federal courts will not look behind the agreement of the parties to assess reasonableness. (See *Postal Telegraph Cable Co. v. Newport* (1918) 247 U.S. 464, 471-474.)

[19]It can be argued that where there is no affirmative entitlement to use particular property, the "negative implications" of the Commerce Clause do not command public entities to make their property available for private use, even in a "monopoly" situation, provided the state or local government's motive for refusing to deal

A. Volumetric Rent Is Commonly Employed Regarding Unimproved Property by Other Lessors and Lessees, Including the Plaintiff Companies

It is fair to assess whether a particular ground lease rental mode is reasonable by examining what goes on in the rental market generally. This is what the Commission did here. The extensive administrative record compiled before the Commission during the hearings on the proposed amendment established that volumetric rental is commonly employed in ground leases (1) regarding all types of commodities, (2) as to both improved and unimproved land, (3) by both private and public lessors, and (4) regarding lessees engaged in interstate and foreign commerce as well as those engaged in intrastate commerce. With particular regard to the plaintiff oil companies, it was established that they and others are already paying such rent to local ports for leases of port property where they, and not the ports, have constructed the improvements. (J.A. 245-246, 183-184, 368-379.)

That the type of variable rent provided for in the Commission's regulations is an established element of ground leasing practice in California and elsewhere is quite obvious even apart from the administrative record. Such variable rentals are treated extensively in a practice book published by the California Continuing Education of the Bar. (Grenert, Ground Lease Practice (Cont.Ed.Bar 1971).) It is there explained that most long-term ground leases have two elements: (1) a minimum annual rent obtained by applying a capitalization rate to the appraised value of the land, and (2) a variable rental. (*Id.*, at § 1.40.) The Commission's volumetric leases have these same ele-

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is not antithetical to the goals of the Commerce Clause. (See *Oklahoma v. Kansas Nat. Gas Co.* (1911) 221 U.S. 229, 260-262 (State allowed the pipelines of intrastate transporters of natural gas to cross its highways, but denied interstate transporters that right, the purpose being to prevent interstate shipment of natural gas produced in Oklahoma).)

ments. The book discusses percentage of income as one means of setting a variable rental, and indicates that minimum rent is applied against the percentage rent. (*Id.*, at § 1.41, p. 40, §§ 2.12-2.14.) Again, this conforms to Commission percentage and volumetric lease practice.

Also pertinent is the following quote from the book:

> "A variation of the percentage-of-income provision is a *gallonage* provision common in service station leases (e.g., two cents per gallon of gasoline delivered by lessee to the premises). In some of these leases, the lessee is to pay the greatest of three figures: a fixed rent, a *gallonage* rate, and a stated percentage of gross sales." (Emphasis added.) (*Id.*, at § 1.41, p. 40.)

It is this same type of volumetric rent which the Commission has authorized as one of its alternative rental formats. It is ironic that the plaintiff oil companies, who have strenuously protested in this lawsuit that volumetric rent is "unreasonable" and "unrelated to a fair return", are themselves charging their own lessees volumetric rent.

Despite the evidence of the practice of lessors generally and of the ports in particular, plaintiffs press the argument that volumetric rentals are not appropriate for ground leases, but can be employed only where services, facilities, or improvements are provided by the lessor. But the fact that the Commission seeks such rent for "mere land" only suggests that the State's volumetric rents will tend to be less in amount, not that the mode itself is inappropriate. And in fact, the Commission's negotiated rates have been lower than those of the ports. (Compare the volumetric rates in the leases attached to plaintiffs' declarations (e.g., J.A. 42-45, 64-67) with the port wharfage rates set forth in the Horn Affidavit (J.A. 113-114) and the Long Beach tariff (J.A. 287).

There is no unique constitutional validity to the type of fixed annual rent that the oil companies argue is the Commission's sole option in entering ground leases for its property. Unimproved land has a rental value that can as easily be tied to the land's utility as to the market value of the fee. Variable rents focus on the land's utility, using its market value, if at all, only to derive a minimum rent. This is true of percentage rent as well as volumetric rent such as that collected by the oil companies themselves from their service station lessees. Such leases measure utility in terms of intensity of use, i.e., the volume of sales on the leased land (percentage leases) or the volume of commodities passing over the leased land (volumetric leases).

The court of appeals did not dispute the Commission's determination, upheld by the state court of appeal in the state proceedings (*ante*, p. 10), that there was a reasonable basis in accepted ground lease practice for authorizing use of the challenged form of rent. It nonetheless concluded that a rental form that could be employed regarding lessees engaged in intrastate commerce was constitutionally proscribed if the lessee was engaged in interstate or foreign commerce. This conclusion was not based on any determination that the regulation, on its face or in its application, discriminated against these plaintiffs or against interstate or foreign commerce.[20] Nor did the court point to any unto-

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[20]In fact, the Commission has employed the volumetric type of rent authorized by the regulation regarding lessees who are neither oil companies nor engaged in interstate or foreign commerce. (J.A. 110.) The decision of the court of appeals did, however, seem to be impliedly based on a perceived *potential* for abuse in the particular context of renegotiation of rent upon renewal of an existing lease for a marine terminal site adjacent to an existing refinery. (See J.S. App. A-6.) Apart from the fact that initial lease contracts can and do remove such potential (see *ante*, pp. 22-23), such a potential, even if it existed, would be no basis for invalidating a particular form of rent. If bargaining power is indeed unequal, *any* form of rent

ward fiscal burden that would be caused by such rent or to any reduction in the flow of petroleum or petroleum products. And it would be difficult to do so.[21]

The court seemed to base its decision on the supposed compulsion of this Court's decisions involving "user taxes."

B. In Negotiating Ground Lease Rental, the States Are Not Limited to Recovery of Their Out-Of-Pocket Costs

The reliance by the court of appeals on "user tax" cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707; *McCarroll v. Dixie Lines* (1940) 309 U.S. 176; and *Interstate Transit, Inc. v. Lindsey* (1930) 283 U.S. 183, was misplaced. Historically, it appears that "user taxes" were developed in response to early cases of this Court that prohibited "direct" application of general revenue taxes to those engaged in interstate commerce.[22] User taxes were accordingly fashioned to narrowly limit their revenue purpose to recouping state out-of-pocket costs incurred in providing services or facilities that directly benefitted interstate businesses. The cases concerning such taxes, which are unilaterally imposed for the transient nonexclusive use of public facilities, have no application to negotiated ground

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lends itself to "exaction" of exorbitant compensation by the lessor. Such a perceived potential is not a basis for denying to the State a form of rent that is in common use by others. The State stands ready to justify the reasonableness of rents renegotiated upon lease renewals, should such a challenge be made in future litigation.

[21]The regulation was enacted in 1976. Since that time, volumetric rentals exceeding the minimum rent have been placed in a special deposit account in the state treasury pending the outcome of this lawsuit. Twenty-six leases are represented in the account. The total of such impounded volumetric rentals as of July 1, 1984 is a relatively modest amount, $3,063,855, exclusive of accumulated interest.

[22]These formalistic distinctions in the tax field have since been abandoned by the Court. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609; *Complete Auto Transit v. Brady* (1977) 430 U.S. 274; *cf. Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276 (Import-Export Clause).)

leases whereby a lessee appropriates to his own exclusive use a discrete parcel of state property. In fact, this Court in *Evansville Airport, supra,* distinguished between the user tax on transient airport use there at issue and the rent paid by the shops, restaurants, parking concessions, and other "business" users of the airport. (405 U.S. at p. 718.)

Ground leases may employ a variety of rental modes, in none of which is the rent limited solely to what is necessary to recoup the lessor's out-of-pocket costs in providing and leasing the property. Rental under variable rent leases is not so limited, and neither is rental under the nonvariable fixed rent leases endorsed by the court of appeals here. Logically extended, the court's reasoning would mean that the State could recoup only its administrative costs as "rent", because the land that the Commission administers came into state ownership at no cost to the State. To the contrary, an appropriate rent is determined by the rental value of what is leased (computed in various alternative ways), and is not limited to recovery of the lessor's costs.

III. CASES CONCERNING TAXES, IMPOSTS, AND TONNAGE DUTIES HAVE NO APPLICATION TO CONTRACTUAL PAYMENTS FOR THE PRIVATE USE OF STATE-OWNED LAND

Below, the oil companies placed heavy reliance on the cases of this Court which measure various types of taxes against the constitutional limitations imposed by the Commerce, Import-Export, and Tonnage Clauses. If there is a standard of reasonableness to be applied in this case, it cannot be borrowed from such cases. The dangers of uncritically applying "reasonableness" standards from the tax field to state leasing practices have just been demonstrated.

The only basis for the rental mode in question is the State's status as a proprietor of land, not its general sovereign power to tax. We are dealing here with con-

sensual contractual relationships involving the leasing of real property, not with unilaterally-imposed levies by government that are independent of any proprietary touchstone.

The distinction between rent on the one hand, and taxes, imposts, and duties of tonnage on the other, is practical and real, and totally in keeping with the policies embodied in the Constitution. Rent is no less rent merely because its *measure* bears some similarity to certain types of taxes. For instance, a rent measured as a percentage of the leased property's value is not thereby rendered a "tax" merely because ad valorem property taxes are also measured in the same way. Neither is a rent measured by reference to a certain percentage of the gross receipts of the lessee's business on the leased property a "tax" because gross receipts taxes are calculated in the same way. And rent calculated with reference to units of a commodity coming across the leased property is not a "tax" merely because certain taxes may also be computed on a per-unit basis.

This Court has made it clear that charges for the use of public property may take various forms, including charges which, were they imposed as taxes, divorced from the conferral of specific property rights, would be prohibited by the Constitution.

In *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, the company argued that a charge for placing its poles along the city streets was invalid as a tax on interstate commerce. This Court rejected the argument:

> "That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. *It is seeking to collect rent.*" (Emphasis added.) (148 U.S. at p. 98.)

And even in situations where such a charge for government-provided services or property was measured by vessel tonnage, the Court has validated the charge, citing the proprietary nature of the charge and rejecting arguments concerning "duties of tonnage". (*Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 695, 698, 699 (wharfage); *Packet Co. v. Keokuk* (1877) 95 U.S. 80, 87 (wharfage); *Cooley v. Board of Wardens* (1851) 53 U.S. (12 How.) 299, 313-314 (pilotage).) Both *Keokuk* and *Parkersburg* involved wharfage charges graduated by tonnage. The Court stated in *Keokuk*:

> "But a charge for services rendered *or for conveniences provided is in no sense a tax or a duty.* It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of *sovereignty*, not claimed in right of *proprietorship*. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for the use of the wharf, the demand is an assertion, *not of sovereignty*, but of a right of *property*." (Emphasis added.) (95 U.S. at pp. 84-85.)
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> ". . . . Nothing in [*The Tonnage Cases*] justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels." (95 U.S. at p. 87.)

And in *Parkersburg*:

> "We think it very clear that the ordinance in question cannot be regarded as imposing any other charge than that of wharfage. The fact that the rates charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the Constitution and the acts of Congress. [Citations omitted.] . . . . [A duty of tonnage] has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial *regulation*, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a *rent* charged by the owner of the *property* for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel, *or otherwise*, has nothing to do with its essential nature."
>
> (Emphasis added.) (107 U.S. at pp. 698-699.)

The land for wharves, piers, and other appurtenances which the State Lands Commission furnishes its lessees certainly provides the lessees with a necessary component of their operations—land—whether one chooses to term it a "convenience" (*Keokuk*), or just "property" (*Parkersburg*).

In addition to establishing the general point that this Court's tax cases are not helpful in resolving the issues at hand, these latter two cases of course dispose of the companies' argument that any rent negotiated under the rental mode here challenged would constitute a "duty of tonnage". Quite apart from the fact that such rents would not be computed with reference to the size or capacity of

the vessel,[23] they are clearly not imposed for the mere privilege of entering either the State or a port or harbor within the State; and it is only *such* charges, divorced from the provision of particular services or property, that are proscribed by the Tonnage Clause.[24]

By the same reasoning, the same conclusion follows regarding plaintiffs' theory that the challenged regulations provide for "duties" or "imposts" on imports and exports, and are thus proscribed by the Import-Export clause. Rent is not a tax. The volumetric charges are measured only by commodities that pass over discrete parcels of land leased from the State.

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[23]The duties prohibited by the Tonnage Clause relate solely to taxes on *vessels and like instrumentalities of commerce* for the mere privilege of entering a State; the clause has no relevance to goods or cargo. (*Huse v. Glover* (1886) 119 U.S. 543, 549-550; *Inman Steamship Co. v. Tinker* (1876) 94 U.S. 238, 243; *Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 698; *Scandinavian Airlines System, Inc. v. County of Los Angeles* (1961) 56 Cal.2d 11 [14 Cal.Rptr. 25, 363 P.2d 25] (a tonnage duty is imposed on the carrier as distinct from the cargo).) The proscription against duties of tonnage was intended to supplement, not duplicate, the constitutional proscription of the Import-Export Clause against duties on imported or exported goods. (See *Clyde Mallory Lines v. Alabama* (1935) 296 U.S. 261, 264-265; *Steamship Company v. Portwardens* (1867) 73 U.S. (6 Wall.) 31, 34-35.)

[24]*Ibid.*; compare *Cannon v. New Orleans* (1874) 87 U.S. (20 Wall.) 577, where the City of New Orleans passed an ordinance demanding "levee and wharfage dues" for steamboats that merely moored, landed, or stopped anywhere within the Port of New Orleans. There was no indication that the city furnished land, services, or other facilities with the exception of a single wharf. The charges were not limited to vessels using that wharf. The Court invalidated the charge as a duty of tonnage because it was imposed for the mere privilege of a vessel entering the port. The case has no application to a situation where a lessee obtains the right to appropriate a particular parcel of state land to its own commercial use.

Assuming that a reasonableness standard applies here to the Commission's alternative ground lease rental mode, then reasonableness should be determined with reference to the practice in the ground lease rental market regarding alternative means of measuring rental value and obtaining a return on one's land. Attempted application of reasonableness criteria from the specialized field of taxation of interstate and foreign commerce can only lead to anomalous results such as that reached here by the court of appeals.

CONCLUSION

The court of appeals erred in affirming the district court's blanket prohibition of volumetric rents, regardless of amount. There was no basis for invalidating the Commission's regulation, which merely authorizes the negotiation of such rental, and prescribes no rates.

The judgments below should be vacated and the case remanded to the district court for entry of an order denying the motion of plaintiff companies for summary judgment and granting that of the State Lands Commission.

Respectfully submitted,

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APPENDIX

Listed below are the California cities, counties, and harbor districts holding grants of tide and submerged land from the California Legislature, followed by a map showing the location of these grants in relation to leases for marine terminal sites issued by the California State Lands Commission.

Alameda (Stats. 1854, ch. 99; Stats. 1913, ch. 348; Stats. 1917, ch. 594; Stats. 1927, ch. 538; Stats. 1953, ch. 15.)

Albany (Stats. 1919, ch. 211; Stats. 1961, ch. 1763; Stats. 1977, ch. 1223.)

Antioch (Stats. 1955, ch. 1939; Stats. 1957, ch. 1430; Stats. 1963, ch. 1586.)

Arcata (Stats. 1913, ch. 344; Stats. 1917, ch. 542.)

Avalon (Stats. 1943, ch. 303; Stats. 1949, ch. 493; Stats. 1963, ch. 1884.)

Benicia (Stats. 1851, ch. 83; Stats. 1854, ch. 96; Stats. 1855, ch. 187; Stats. 1859, ch. 292; Stats. 1868, ch. 216; Stats. 1965, First Ex. Sess. 1964, ch. 18; Stats. 1965, ch. 2018; Stats. 1967, chs. 329, 1030.)

Berkeley (Stats. 1913, ch. 347; Stats. 1915, ch. 534; Stats. 1917, ch. 596; Stats. 1919, ch. 517; Stats. 1961, ch. 2180; Stats. 1963, First Ex. Sess. 1962, ch. 55.)

Bolinas Harbor District (Stats. 1957, ch. 800; Stats. 1961, ch. 1067; Stats. 1968, ch. 1285; Stats. 1969, ch. 787.)

Brisbane (Stats. 1982, ch. 995; Stats. 1983, ch. 1227.)

Capitola (Stats. 1935, ch. 687; Stats. 1974, ch. 884.)

Carlsbad (Stats. 1963, ch. 2064.)

Carpinteria (Stats. 1968, ch. 1044; Stats. 1971, ch. 1069; Stats. 1978, ch. 697.)

Chula Vista (Stats. 1925, ch. 120; Stats. 1947, ch. 184; Stats. 1953, ch. 593; Stats. 1959, ch. 706; Stats. 1961, ch. 328.)

Coronado (Stats. 1923, ch. 49; Stats. 1929, ch. 681; Stats. 1931, ch. 293; Stats. 1933, ch. 849; Stats. 1939, ch. 893; Stats. 1947, ch. 1563; Stats. 1949, ch. 1013; Stats. 1953, ch. 1839; Stats. 1957, ch. 836; Stats. 1963, First Ex. Sess. 1962, ch. 67.)

Crescent City (Stats. 1868, ch. 299; Stats. 1870, ch. 137; Stats. 1949, ch. 1085; Stats. 1963, ch. 977.)

Crescent City Harbor District (Stats. 1963, ch. 1510.)

Emeryville (Stats. 1919, ch. 515; Stats. 1959, ch. 921; Stats. 1968, ch. 415.)

Eureka (Stats. 1857, ch. 82; Stats. 1915, ch. 438; Stats. 1927, ch. 187; Stats. 1945, ch. 225; Stats. 1959, ch. 106; Stats. 1970, chs. 1085, 1086; Stats. 1971, chs. 1001, 1252; Stats. 1975, ch. 600; Stats. 1978, ch. 1095; Stats. 1982, ch. 1068.)

Hermosa Beach (Stats. 1919, ch. 479.)

Humboldt Bay Harbor, Recreation, & Conservation District (Stats. 1970, ch. 1283; Stats. 1971, ch. 1742; Stats. 1974, ch. 1191; Stats. 1975, ch. 587; Stats. 1976, ch. 1040.)

Imperial Beach (Stats. 1961, ch. 330.)

Laguna Beach (Stats. 1929, ch. 50.)

Long Beach (Stats. 1911, ch. 676; Stats. 1925, ch. 102; Stats. 1935, ch. 158; Stats. 1947, ch. 39; Stats. 1951, ch. 915; Stats. 1957, Ex. Sess. 1956, ch. 29; Stats. 1957, chs. 1151, 2000; Stats. 1959, chs. 1551, 1560; Stats. 1961, ch. 1579; Stats. 1963, chs. 1398, 1847; Stats. 1965, First Ex. Sess. 1964, ch. 138; Stats. 1965, ch. 1688; Stats. 1971, ch. 1252; Stats. 1975, ch. 600.)

Los Angeles (Stats. 1911, ch. 656; Stats. 1913, ch. 245; Stats. 1917, chs. 77, 115; Stats. 1921, ch. 768; Stats. 1929, ch.

651; Stats. 1945, ch. 1513; Stats. 1951, ch. 443; Stats. 1970, ch. 1046; Stats. 1979, ch. 926.)

Manhattan Beach (Stats. 1955, ch. 1427; Stats. 1963, ch. 1593.)

Marin County (Stats. 1897, ch. 81; Stats. 1959, ch. 497; Stats. 1965, First Ex. Sess. 1964, ch. 49; Stats. 1967, ch. 1391; Stats. 1969, chs. 787, 1375; Stats. 1974, ch. 813; Stats 1975, ch. 898.)

Martinez (Stats. 1976, ch. 815.)

Mill Valley (Stats. 1959, ch. 496.)

Monterey (Stats. 1868, ch. 210; Stats. 1903, ch. 237; Stats. 1919, ch. 669.)

Morro Bay (Stats. 1947, ch. 1076; Stats. 1955, ch. 413; Stats. 1957, ch. 1874; Stats. 1961, First Ex. Sess. 1960, ch. 70.)

Moss Landing Harbor District (Stats. 1947, ch. 1190; Stats. 1967, ch. 131.)

National City (Stats. 1917, ch. 28; Stats. 1923, ch. 46; Stats. 1925, ch. 50.)

Newport Beach (Stats. 1919, chs. 494, 495; Stats. 1925, ch. 121; Stats. 1953, ch. 1096; Stats. 1978, ch. 74.)

Noyo Harbor District (Stats. 1961, ch. 555.)

Oakland (Stats. 1852, ch. 107; Stats. 1854, ch. 73; Stats. 1862, ch. 294; Stats. 1874, ch. 113; Stats. 1909, ch. 390; Stats. 1911, chs. 654, 657; Stats. 1917, ch. 59; Stats. 1919, ch. 516; Stats. 1923, ch. 174; Stats. 1931, ch. 621; Stats. 1937, chs. 45, 96, 343, 908; Stats. 1939, chs. 143, 146, 147; Stats. 1941, ch. 720; Stats. 1943, ch. 607; Stats. 1945, ch. 218; Stats. 1953, ch. 658; Stats. 1955, ch. 1028; Stats. 1957, ch. 709; Stats. 1961, First Ex. Sess. 1960, ch. 15; Stats. 1961, ch. 931; Stats. 1965, ch. 1737; Stats. 1981, ch. 1016.)

Oceanside (Stats. 1979, ch. 846.)

Orange County (Stats. 1919, ch. 526; Stats. 1929, ch. 575; Stats. 1931, ch. 200; Stats. 1961, ch. 321; Stats. 1975, ch. 415.)

Palos Verdes (Stats. 1963, ch. 1975; Stats. 1968, ch. 316.)

Pittsburg (Stats. 1937, ch. 214; Stats. 1961, ch. 1835; Stats. 1963, ch. 1828.)

Port San Luis Harbor District (Stats. 1955, ch. 647; Stats. 1957, ch. 302.)

Redondo Beach (Stats. 1915, ch. 57; Stats. 1971, ch. 1555.)

Redwood City (Stats. 1945, ch. 1359; Stats. 1947, ch. 1394; Stats. 1955, First Ex. Sess. 1954, chs. 33, 34; Stats. 1961, ch. 2125; Stats. 1963, ch. 1658.)

Richmond (Stats. 1913, ch. 317; Stats. 1919, ch. 89; Stats. 1933, ch. 53; Stats. 1935, ch. 379; Stats. 1959, ch. 1336; Stats. 1971, ch. 233.)

Sacramento (Stats. 1868, ch. 519; Stats. 1970, ch. 1266; Stats. 1973, ch. 625.)

San Diego (Stats. 1911, ch. 700; Stats. 1913, ch. 77; Stats. 1915, ch. 676; Stats. 1943, chs. 70, 222; Stats. 1945, chs. 142, 222, 693; Stats. 1947, ch. 197; Stats. 1955, ch. 1455; Stats. 1961, ch. 479; Stats. 1963, chs. 2139, 2140; Stats. 1981, ch. 1008; Stats. 1982, ch. 482.)

San Diego Unified Port District (Stats. 1963, First Ex. Sess. 1962, ch. 67; Stats. 1963, ch. 673; Stats. 1965, chs. 349, 577, 1744; Stats. 1973, ch. 1114.)

San Francisco (Stats. 1851, ch. 41; Stats. 1853, chs. 24, 160; Stats. 1855, ch. 181; Stats. 1868, ch. 543; Stats. 1872, ch. 490; Stats. 1874, ch. 264; Stats. 1878, ch. 219; Stats 1903, ch. 265; Stats. 1923, ch. 88; Stats. 1927, ch. 784; Stats. 1931, chs. 627, 857, 1003; Stats. 1933, chs. 805, 912; Stats. 1935, ch. 437; Stats. 1937, ch. 368; Stats. 1943, ch. 987; Stats. 1947, chs. 434,

872; Stats. 1953, ch. 1252; Stats. 1959, First Ex. Sess. 1958, ch. 2; Stats. 1962, ch. 11; Stats. 1963, chs. 941, 1273, 1298; Stats. 1968, ch. 1333; Stats. 1969, chs. 1296, 1367, 1400, 1474; Stats. 1970, ch. 670; Stats. 1971, ch. 1253; Stats. 1975, chs. 422, 964; Stats. 1976, ch. 352; Stats. 1979, ch. 745.)

San Mateo (Stats. 1915, ch. 536; Stats. 1933, ch. 245; Stats. 1976, ch. 1099.)

San Mateo County (Stats. 1893, ch. 24; Stats. 1965, ch. 1857.)

San Mateo County Harbor District (Stats. 1961, First Ex. Sess. 1960, ch. 68.)

San Rafael (Stats. 1923, ch. 83; Stats. 1967, ch. 178; Stats. 1970, ch. 1383; Stats. 1971, ch. 1742.)

Santa Barbara (Stats. 1925, ch. 78; Stats. 1937, chs. 13, 365; Stats. 1941, 5th Ex. Sess. 1940, ch. 9; Stats. 1975, ch. 193.)

Santa Barbara County (Stats. 1931, ch. 846; Stats. 1968, ch. 1044.)

Santa Cruz (Stats. 1972, ch. 342; Stats. 1968, ch. 902; Stats. 1969, ch. 1291.)

Santa Cruz County (Stats. 1935, ch. 687; Stats. 1959, ch. 1938; Stats. 1968, ch. 902; Stats. 1974, ch. 884.)

Santa Cruz Port District (Stats. 1968, ch. 818.)

Santa Monica (Stats. 1917, ch. 78; Stats. 1949, ch. 616; Stats. 1970, ch. 1077.)

Sausalito (Stats. 1953, ch. 534; Stats. 1957, ch. 791.)

Sonoma County (Stats. 1943, ch. 218; Stats. 1951, ch. 1406; Stats. 1959, ch. 1064; Stats. 1961, ch. 799.)

South San Francisco (Stats. 1913, ch. 345; Stats. 1925, ch. 56.)

Stockton (Stats. 1965, ch. 1700.)

Vallejo (Stats. 1913, ch. 310; Stats. 1925, ch. 417; Stats. 1947, ch. 483; Stats. 1957, chs. 117, 1501; Stats. 1962, ch. 11; Stats. 1963, First Ex. Sess. 1962, ch. 63; Stats. 1963, ch. 24, Stats. 1980, ch. 895.)

Ventura (Stats. 1935, ch. 213.)